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No. 96-552, 96-553

In The

Supreme Court of the United States

October 1996 Term

RACHEL AGOSTINI, et al,

Petitioners,

- against -

BETTY LOUISE FELTON, et al,

Respondents.

CHANCELLOR OF THE BOARD OF EDUCATION, et al,

Petitioners,

- against -

BETTY LOUISE FELTON, et al,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMICUS BRIEF OF NEW YORK COUNTY LAWYERS ASSOCIATION COMMITTEE ON SUPREME COURT OF THE UNITED STATES

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QUESTIONS PRESENTED

May Rule 60(b), Federal Rules of Civil Procedure, be used years later by a losing party as a procedural vehicle to seek to change the decisional law in the very same case the party litigated and lost when principles of finality, res judicata, law of the case, and the time requirements of the rule of this Court as to a rehearing petition otherwise foreclose reconsideration?

As this case is improvidently before the Court, should the writ of certiorari be vacated?

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This brief is submitted with the consent of the parties. Letters reflecting such consent are being filed with the Clerk of the Court.

INTEREST OF AMICUS BAR ASSOCIATION COMMITTEE

The New York County Lawyers Association is a not-for-profit bar association based in New York City, in existence for almost a hundred years, with a membership of approximately 10,000 attorneys. The late Chief Justice Charles Evans Hughes served as its president during 1919-1921. The Association's Committee on the Supreme Court of the United States ("bar association committee") is committed to studying the practices and procedures of the High Court, and is protective of the Court's traditions, jurisprudence, jurisdiction, and procedures. Our programs include forums on the certiorari procedure, and on the substantive issues of the new federalism, separation of powers, and the first amendment.

As a bar association committee, we take no position as to the merits of the substantive issue as to the continued vitality of *Aquilar*. We differ from the parties and the other amici in that we limit our concerns to the procedural issue of Rule 60(b), FRCP — its appropriateness, its potential for good and harm, its future use and misuse. As such, we are the only amici who are purists — we have no axe to grind on the merits as to who should win or lose, or whether *Aquilar* should be sustained, vacated, or left alone for another day.

For jurisdictional purposes, we are deeply concerned as to whether or not Rule 60(b) should be used years later by a losing party to change the decisional law in the very same case they litigated and lost when principles of finality, res judicata, law of the case, and the time requirements of a rehearing petition in this Court otherwise foreclose reconsideration.

As a bar association committee, with no substantive agenda, we respect the carefully drafted position of the Solicitor General, who shares our procedural concerns, not just for this proceeding, but also for future proceedings before the Court. However, the Solicitor General in this instance is not an amicus, but counsel to a party — the Secretary of Education — with a vested interest in the outcome. His client's position has caused a difference between the Solicitor General and our committee as to the use in this instance of Rule 60(b). In contrast, our bar association group is detached — we do not have a client — and our interest is solely in protecting the integrity of procedural rules, and its limitations, in challenging established decisional law.

STATEMENT OF THE CASE

As the Court does not need another recitation of the statement of the case, we adopt the statement of the Solicitor General.

SUMMARY OF ARGUMENT

Rule 60(b), FRCP, may not be used as a procedural vehicle ten years later by a losing party to seek to change the decisional law in the very same case the party litigated and lost when principles of finality, res judicata, law of the case, and the time requirements of a rehearing petition in this Court otherwise foreclose reconsideration.

Rule 60(b) does not give a losing party a second appeal as to the merits of the underlying final judgment. Nor was Rule 60(b) designed to provide a vehicle for obtaining a change in existing decisional law.

The writ of certiorari should be vacated for this case is improvidently before the Court.

ARGUMENT

RULE 60(b) IS NOT AVAILABLE TO A LOSING PARTY TO SEEK TO CHANGE THE DECISIONAL LAW IN THE VERY SAME CASE THE PARTY LITIGATED AND LOST

A. DECISIONAL LAW DOES NOT SUPPORT USE OF RULE 60(B) TO CHANGE DECISIONAL LAW

In its earlier brief in support of the petition for certiorari, the Solicitor General wrote (pp. 11-12):

> "We are *not* aware however of any instance in which *the Court has reconsidered the merits* of a prior decision *in the same* case in a procedural posture similar to this one in which the case returned to this Court from a lower court *after entry of a final judgment on remand* and denial of a motion for relief from that judgment." (emphasis added).

Our research of decisional law confirms the position of the Solicitor General — there just are not any reported instances in which this Court, years later, at the request of the losing party, has reconsidered its prior decision *in the same case* involving the very *same parties*.

In its brief on the merits, in seeking to bypass well established jurisdictional limitations, the Solicitor General candidly conceded (page 46):

> "the *difficulty* here arises from the fact that the Court has decided *the precise issue in this very case*." (emphasis added).

We agree with the Solicitor General - it is indeed a "difficulty". However, the Solicitor General's attempt to make the "difficulty" disappear does violence to the limitations carefully adopted by this Court during years of decision making.

B. REHEARING PROCEDURE (RULE 44.1) AS TO REQUIREMENTS OF TIME AND SUPPORT OF JUSTICE IN THE MAJORITY NOT FOLLOWED

In footnote 18, at page 51 of its brief, the Solicitor General cites as support the Court's reversal of prior decisions, in successful rehearing petitions, in *Reid v. Covert*, 354 U.S. 1 (1957) and *Jones v. Opelika*, 319 U.S. 103 (1943). However, in each instance, in compliance with Rule 44.1 of the Supreme Court, the rehearing petition was timely filed within twenty-five days of the decision with the very same panel of nine Justices — and enjoyed the support of at least one justice who was a member of the majority and who was prepared to change his vote. In sharp contrast to our situation, the composition of the Court has substantially changed since 1985.[1] Only Justice

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1

Change in composition of the Court does not provide a basis for reconsideration of decisional law. As stated in *Planned Parenthood v.*

Stevens remains as a member of the majority, and we have no indication that he is prepared to change his vote.

C. THERE IS AN ABSENCE OF AN APPROPRIATE RECORD TO WARRANT APPELLATE REVIEW

Justice O'Connor's concurring opinion in *Rufo v. Inmates of Suffolk Jail*, 502 U.S.367, (1992), dealing with the issue of modification of an injunction, is most helpful.

Justice O'Connor notes "the limited nature of our review", and reminds us "an appellate court should examine primarily *the method* in which the district exercises its discretion, not the substantive outcome the district court reaches." 502 US at 393, 394.

Of course, in our situation the district court never exercised its discretion; never engaged in the balancing of competing and complex factors; never conducted an evidentiary hearing; never made findings of fact and conclusions of law; never developed a full record appropriate for appellate review in the first instance by the Court of Appeals and subsequently in limited situations, by this Court; and never concluded that the City of New York had met its heavy burden of demonstrating changed circumstances warranting modification of an injunction of twelve years duration which fully and satisfactorily implemented the Title I

Casey, to abandon principles of stare decisis to overrule a case "on ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of government. No misconception can do more lasting injury to this Court and to the system of law." 505 U.S. 833, 864.

remedial program for students, but at a cost to the City of New York. There just is no district court record for the Court to review.

In the majority opinion, Justice White observed that a district court may modify an injunction *only* when it is "no longer equitable", *not* when it is "no longer convenient". 502 U.S. at 383. Also Justice White noted modification by the district court is not warranted when a party relies upon events that from the inception were anticipated or foreseen. 502 US at 385. Again, in our matter, we have no findings by the district court, or even an appropriate record of testimony and exhibits, to support any such conclusions as to changed circumstances and/or no longer equitable.

No compelling reason has been advanced by the City of New York why this Court should rush to judgment and ignore well established rules governing injunction litigation, appellate review, and Rule 60(b).

Basically the complaint of the City of New York is that the compliance with *Aquilar* costs money. Obviously all parties knew that fact from the inception — it was foreseen and foreseeable — transportation (busing) of students always costs money. While Justice O'Connor noted that expense factors can never be used to avoid constitutional requirements, and that local fiscal matters can be considered in limited non-constitutional requirements, in our situation, the City of New York's complaint is that Congress will not finance the extra expenses —purely a legislative and political issue. The fact that Congress chose not to appropriate funds does not convert a legislative decision into a "case or controversy" for the federal courts to adjudicate.

Nor should this Court be asked to render an advisory opinion as to what it would do *if* it had the benefit of a fully developed district court record; if it had findings of fact and conclusions of law from the district court; and if it had a decision on the merits from the Court of Appeals. In the absence of these prerequisites, this Court is being asked to decide the controversy between the parties as if it were a district court ruling on a motion to dismiss the initial pleading.

D. AS DECISIONAL LAW SUPPORTING INJUNCTION IS STILL EXISTING LAW, THERE IS NO BASIS FOR USE OF RULE 60(b)

Nor does the posture of the decisional law require this Court to stretch at this time to reevaluate its prior decision in *Aquilar*. In *Bowen v. Kendrick*, 487 US 589 (1988) and *Zobrest v. Catalina Foothills School District*, 509 US 1 (1991), cited for support by the Solicitor General, the Court chose not to reassess *Aquilar*, and decided each case without disturbing *Aquilar*. In *Kiryas Joel* (512 US 687) the Court had no difficulty reaching its decision without vacating *Aquilar*. As such, in three matters the Court chose not to vacate *Aquilar*. Obviously, if in any of these cases the Court had vacated *Aquilar*, we would then have decisional law undermining the legal basis of the injunction, and this "change of circumstances" would support a modification of the injunction. *Pasadena City Board of Education v. Spangler*, 427 US 424, 433-435 (1976), relied upon by the Solicitor General, requires that intervening decisional law shall have been enunciated as decisional law in a prior case by a majority of the Court, and not merely be suggestions for a change in the law expressed in concurring opinions or dissenting opinions by individual justices. As the Court wrote *In re Permian Basin*

Area Rate cases, "this Court does not decide important questions of law by cursory dicta inserted in unrelated cases". 390 U.S. 747, 775 (1968).

In his recent treatise, *A Matter of Interpretation: Federal Courts and the Law*, Justice Scalia explained that the law in order to survive requires formalism and the adherence to established procedures. "The rule of law is about form" at 25. Our committee agrees, and requests this Court not to deviate from well established procedures and decisional law. The price is too high. In law as in sports, form prevails.

CONCLUSION

As this case is not appropriately before the Court for resolution, the writ of certiorari should be vacated.

Alternatively, the Court should hold that the use of Rule 60(b) in this matter is not permissible.

Dated: March 25, 1997

Respectfully submitted,

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